Supreme Court, U.S.
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No. 98_____

In The

Supreme Court of the United States

October Term, 1998

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SERGIO LAFONTAINE,

Petitioner,

-against-

COMMISSIONER OF CORRECTIONAL SERVICES,

Respondent.

On Petition for Writ of Certiorari

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the disproportionate exclusion of Hispanic venirepersons demonstrates purposeful racial discrimination in violation of the equal protection clause?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS FOR THE SECOND CIRCUIT

The official caption of the case in the Court of Appeals for the Second Circuit was:

Sergio LaFontaine,

Petitioner-Appellant,

-against-

Commissioner of Correctional Services,

Respondent-Appellee.

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No. 98___

In The

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SERGIO LAFONTAINE,

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COMMISSIONER OF CORRECTIONAL SERVICES,

Respondent.

On Petition for Writ of Certiorari

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below.

OPINIONS BELOW

The summary order and opinion of the United States Court of Appeals for the Second Circuit, dated March 30, 1998, is included in the appendix to this

Petition for Certiorari, (1a - 4a).[1] The orders of the United States Court of Appeals for the Second Circuit dated April 9, and April 14, 1998, first granting, then denying the motion for an extension to file a Petition for Rehearing appear in the Appendix, at (5a - 6a). The Memorandums and Orders of the district court denying the petition for a writ of habeas corpus and granting a certificate of appealability appear in the Appendix, at (13a - 14a). The Report and Recommendation of the Honorable Naomi Reice Buchwald with respect to the prosecutor's use of peremptory challenges appears in the Appendix, at (7a - 12a).

The decision of the New York State Appellate Division, First Judicial Department, *People v. LaFontaine*, is reported at 190 A.D.2d 609, 594 N.Y.S.2d 986 (1st Dept. 1993) and is in the Appendix, at (A). The orders of the New York State Court of Appeals denying petitioner's application for leave to that court appear on in the Appendix, at (18a - 19a).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution which provides in pertinent

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[1] "A" preceded by a number refers to page numbers of the Appendix filed with the Petition for a Writ of Certiorari.

part:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within the jurisdiction the equal protection of the laws ....

STATEMENT OF THE CASE

A. BACKGROUND

In 1988, Petitioner and eleven other individuals were indicted by the Grand Jury of New York County and charged with criminal possession of a controlled substance in first degree, conspiracy in the second degree and other crimes. In February, 1989, Petitioner along with two others proceeded to trial. After a jury trial, Petitioner was found guilty of criminal sale of a controlled substance in the first degree, conspiracy in the second degree, and other crimes. On May 24, 1989, he was sentenced to a term of imprisonment totaling 35 years to life.

On direct appeal, Petitioner, a Hispanic man, asserted, *inter alia*, that the prosecutor exercised peremptory challenges to exclude Hispanic venirepersons from the jury. The Appellate Division, First Judicial Department, affirmed the judgment on January 23, 1993.

People v. LaFontaine, 190 A.D.2d 609, 594 N.Y.S.2d 986 (1st Dept. 1993). Petitioner then made timely application for a certificate seeking permission to appeal to the New York Court of Appeals pursuant to *Criminal Procedure Law* § 460.20. On May 24, 1993, the Court denied his request (*People v. LaFontaine,* 81 N.Y.2d 1015; 600 N.Y.S.2d 203; 616 N.E.2d 860 (1993). On August 20, 1993, his application for reconsideration by the Court was also denied.

In December, 1996, Petitioner filed a habeas corpus proceeding pursuant to 28 U.S.C. § 2254. In June, 1997 the district court adopted the report of the Magistrate Judge and dismissed the petition. The court concluded that petitioner's *Batson* claim had been waived and that as a whole there was no *Batson* violation in connection with the prosecutor's peremptory challenges. A certificate of appealability was issued by the district court on August 7, 1997, confined to the question whether the prosecutor's use of peremptory challenges violated *Batson v. Kentucky*, 476 U.S. 79 (1986).

On March 30, 1998, the United States Court of Appeals for the Second Circuit held in a summary order that the trial record supported the trial court's finding that prosecutor's use of peremptory challenges was not motivated by racial discrimination and affirmed the judgment of the district court. The court did not reach the question as to whether Petitioner waived his *Batson* challenge. A motion for an extension of time to file a petition for rehearing was granted on April 9, 1998. That order was subsequently vacated on April 14, 1998, and the motion denied.

Jurisdiction in the district court was pursuant to 28 U.S.C. §§ 2241, 2254 and 1331. Jurisdiction in the Court of Appeals was pursuant to 28 U.S.C. §§1291 and 2253, and Rules 4 and 22 of the Rules of Appellate Procedure.

B. THE JURY SELECTION PROCESS

After the first round of juror challenges by the assistant district attorney prosecuting the case, defense counsel objected to the use of six peremptory challenges to excuse all potential jurors with Hispanic surnames (20a - 23a). When asked to explain the challenges, the assistant district attorney claimed that she had struck two of the jurors, surnames Valez and Vasquez, because each had "a problem understanding." With respect to a third Hispanic struck named Vargas, she stated that he "seemed very soft-spoken and I, on a personal, did not feel comfortable with the juror." With regard to a fourth venireperson named Rodriquez, the assistant district attorney stated "she equivocated on the issue whether she could be fair. She thought she could be fair. My impression of that was that she really had no position one way or the other. She would try to be fair but she wasn't sure and that was the basis for striking her from the panel." (23a - 24a).

Defense counsel reminded the Court that earlier it had "commended" Rodriquez's answers to the other jurors, and then defense counsel expressed disbelief for the prosecutor's proffered excuse in view of the fact that no earlier attempt had been made to challenge the juror for cause (24a). Finally, with regard to the fifth Hispanic juror named Adelpho Felix, the assistant district attorney simply stated that "I did not assume that he was

Hispanic" (23a).

The Court accepted the explanations as to Valez and Vasquez, but rather than rely on the reason for Vargas, added that since the juror was suing the Police Department, either side would have been justified in excluding him. It then expressed its own skepticism for the assertion by the assistant district attorney that she did not know that Felix was an Hispanic name (25a).

Later during the jury selection process, the assistant district attorney tried to have another Hispanic juror named Hector removed, this time for cause, because she felt that her experience with translations would prevent her from listening impartially to Spanish translations at trial. The Court denied the challenge reminding her that Hector said "she can follow the law." The juror was eventually peremptorily challenged by the People (27a - 28a).

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT A WRIT OF CERTIORARI TO DETERMINE IF A DISPROPORTIONATE EXCLUSION OF HISPANIC VENIREPERSONS DEMONSTRATES PURPOSEFUL RACIAL DISCRIMINATION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE TO THE CONSTITUTION

This case will determine if this court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), has any continued meaning and effect for people of Hispanic

origin. Ordinarily, given the trial court's proximity, great deference is afforded its determination that a peremptory strike was made for race-neutral reason. *Hernandez v. New York*, 500 U. S. 352, 364 (1991). And in a 28 U.S.C. § 2254 habeas case, the state court's findings of fact are entitled to a presumption of correctness (see 28 U.S.C. §2254 [d][8]). In this case, however, the consistent policy of the prosecutor in striking prospective venirepersons of the same ethnic background as Petitioner demonstrated a purposeful effort to remove every Hispanic from the jury.

There was no question that the record at trial amply demonstrated a *prima facie* case of racial discrimination. In the very first round of challenges following voir-dire examination, the prosecutor struck ever single prospective juror with an Hispanic surname--Valez, Vasquez, Vargas, Rodriquez, and Felix. Even before she completed announcing her challenges, the discriminatory pattern was evident to defense counsel:

THE COURT: Preemptory by the People?

MS. MANUELIAN: One, three, four, seven, eight, nine –

MR. OLIVERO: I am getting the distinct feeling that the People are eliminating –

MR. EVSEROFF: Let her finish.

THE COURT: Mr. Smith, #11?

MR. EVSEROFF: Yes.

MR. MANUELIAN: Mr Vargas #12.

MR. MARI: All hispanics....

MR. OLIVERO: For the record, Judge, I know that the District Attorney has been systematically taking off blacks and hispanics, especially hispanics...She intimated earlier that hispanics might know what was on the tape should the tapes have to be played and, at this point, she intimated that the defense would want hispanics,and after seeing her preemptory challenges, it seems clear to me that she is knocking off as many minority members, specifically spanish and blacks." (20a - 22a).

Trial counsel commented that these challenges resulted in the elimination of almost every Hispanic from the remaining pool of jurors in the courtroom and strenuously objected, accusing the prosecutor of "racism" (23a). Later, she peremptorily challenged yet another prospective Hispanic juror.

This Court had repeatedly found that the racially motivated use of peremptory challenges by a prosecutor violates the Equal Protection Clause of the Fourteenth Amendment. *Hernandez v. New York*, *supra*, 500 U.S. 352 (1991); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Swain v.Alabama*, 380 U.S. 202 (1965). Here, in order to establish a *prima facie* case of discrimination by the prosecution, the defendant had to have demonstrated three elements: "One, that he [or she] is a member of cognizable racial group; two, that the prosecutor exercised peremptory challenges to remove members of the defendant's race from the venire; and three, facts and other relevant circumstances sufficient to raise an inference that the prosecutor used the challenges to

exclude people because of their race." *Batson v. Kentucky*, 476 U.S. at 98 n.20.

Clearly, the *Batson* threshold was met by Petitioner: "The exercise of prosecutorial peremptory challenges to exclude the only Latino jurors in the prosecution of a Latino defendant is enough" *Batson v. Kentucky*, 476 U.S. at 96-97. Thereafter, the trial court sought the reasons for the challenges. The reasons for two strikes were deemed acceptable by the trial court. However, with regard to three prospective Hispanic jurors, Petitioner argued that the prosecutor's responses were totally inadequate, and in two instances, patently disingenuous.

With regard to Ms. Rodriquez, the prosecutor asserted that she "equivocated" on her ability to be fair. This excuse was challenged by trial counsel who reminded the Court that it had "commended her answer to all the potential jurors". Similarly, with regard to venireperson Adelpho Felix, the prosecutor's proffered that "I did not assume that the juror was Hispanic", an excuse the court viewed with doubt. Notably, "the prosecutor must give a 'clear and reasonably specific' explanation of his [or her] 'legitimate reasons' for exercising the challenges." *Batson v. Kentucky*, at 98 n.20, citing *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981). In both instances, the explanations offered fell far short of this standard.

With regard to venireperson David Vargas, the prosecutor stated that he "seemed very soft spoken and I on a personal, did not feel comfortable with that juror". While an explanation need not rise to the level necessary

for a challenge for cause, some statement involving the prospective juror's qualifications, or lack thereby, must be advanced as a reason for exclusion rather than merely a subjective or "intuitive" evaluation of the juror's personality (*Batson v. Kentucky,supra*, 476 U.S. at 97).

On a subsequent round of challenges, the prosecutor once again peremptorily challenged a prospective Hispanic juror with the surname Hector. However this time, she first tried to have the juror discharged for cause, arguing to the court that her experience with translations would prevent her from listening impartially to Spanish translations. The trial court overruled the challenge, pointing out that the juror said "she can follow the law."

Viewed in the totality, the reasons offered for all these challenges fell far short of the requirement that a "legitimate" reasons be given for exercising peremptory challenges. While this Court has ruled that a state court's acceptance of reasons proffered for a prosecutor's are deemed to be sufficient regardless of how implausible or unpersuasive they may be, as long as the reasons are race-neutral (*Purkett v. Elem*, 115 S.Ct. 1769 [1995]), the persistent use of patently implausible reasons for striking Hispanics as was evident in this case exposes a pattern of purposeful discriminatory intent: "Circumstantial evidence of invidious intent may include proof of disproportionate impact. *Washington v. Davis*, 426 U.S. 229 at 242 (1976). We have observed that under some circumstances proof of discriminatory impact 'may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.' *Ibid.* For

example 'total or seriously disproportionate exclusion of Negroes from jury venires,' *ibid.*, "is itself such an 'unequal application of the law ... as to show intentional discrimination,'" id., at 241 ...(quoting *Akins v. Texas*, 325 U.S. at 404)." *Batson v. Kentucky*, 476 at 93.

Uncontravertible proof that the People saw fit to attempt to discharge all Hispanics from the jury supports a reasonable inference that Hispanics were being excluded for reasons wholly unrelated to the outcome of the case: "For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government. *Smith v. State of Texas*, 311 U.S. 128, 130 (1940). In sum, " [j]urymen should be selected as individuals, on the basis of individual qualifications, not as members of a race." *Cassell v. State of Texas*, 339 U.S. 282, 286 (1950). In Petitioner's case, the prosecutor's conduct in challenging Hispanic venirepersons demonstrated a clear-cut policy of eliminating that group from service on the jury. Accordingly, this Court should grant certiorari to make it clear that the right to equal protection under the law is respected.

CONCLUSION

For these reasons, Petitioner Sergio LaFontaine respectfully requests that a Writ of Certiorari should issue in this case.

Dated: New York, New York
June 26, 1998

Respectfully submitted,

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No. 98_____

In The

Supreme Court of the United States

October Term, 1998

—♦—

SERGIO LAFONTAINE,

Petitioner,

-against-

COMMISSIONER OF CORRECTIONAL SERVICES,

Respondent.

On Petition for Writ of Certiorari

APPENDIX

SW

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Appendix A - Summary Order and Opinion of the United States Court of Appeals for the Second Circuit, Dated March 30, 1995 [Pages 1a - 4a]

SDNY/NYNY
96-cv-9308
McKenna

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United Staten Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 30th day of March, one thousand nine hundred and ninety-eight.

PRESENT: HON. DENNIS JACOBS,
HON. PIERRE N. LEVAL,
HON. JOHN R. GIBSON,*

Circuit Judges.

----------x

SERGIO LAFONTAINE,

Petitioner-Appellant,

-v.- 97-2546

COMMISSIONER OF CORRECTIONAL SERVICES,

Respondent-Appellee.

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* Of the United States Court of Appeals for the eighth circuit, sitting by designation.

Appendix A
[Summary Order and Opinion of the United States Court of Appeals for the Second Circuit]

APPEARING FOR APPELLANT: PERRY S. REICH, Lindenhurst, NY (Schapiro & Reich, on the brief)

APPEARING FOR APPELLEE: MARK DWYER, Assistant District Attorney New York, NY (Robert M. Morgenthau, District Attorney for New York County, on the brief).

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the order of the district court is **AFFIRMED**.

Sergio LaFontaine appeals from an order of the United States District Court for the Southern District of New York (McKenna, J.), dismissing his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. LaFontaine asserted several claims for habeas relief, but the district court issued a certificate of appealability only as to the question of whether the prosecutor's use of peremptory challenges violated *Batson v. Kentucky*, 476 U.S. 79 (1986).

LaFontaine was convicted on various narcotics charges

following a jury trial in New York State Supreme Court in 1989, and was sentenced to a prison term of 25 years to life, as well as several lesser concurrent terms. After the *voir dire* examination, the prosecutor had used peremptory challenges to strike more than ten jurors, five of whom were Hispanic. The defense objected to these five challenges, but the trial court found that the prosecutor offered nondiscriminatory reasons for her decisions. LaFontaine pursued his appeals unsuccessfully through the New York State court system.

LaFontaine filed this petition in December 1996. Judge McKenna referred the petition to Magistrate Judge Buchwald, who issued a detailed Report and Recommendation, concluding that LaFontaine had waived his *Batson* challenge; and that even if the claim had not been waived, it failed on the merits. Judge McKenna adopted the Report and Recommendation in the Memorandum and Order dismissing LaFontaine's petition.

This Court reviews *de novo* a district court's denial of habeas relief. *Williams v. Bartlett*, 44 F.3d 95, 99 (2d Cir. 1994). We need not reach the question of whether LaFontaine waived his *Batson* challenge, because we agree with the district court that even if not waived, it fails on the merits. The state trial court's findings of fact are presumed to be correct, and petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1) (as amended). LaFontaine has failed to carry this burden successfully. The record sufficiently supports the trial

courts finding that the prosecutor's peremptory strikes were not motivated by racial discrimination.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

FOR THE COURT:

GEORGE LANGE III, Clerk
by: Chandella Armstrong,
Deputy Clerk

Appendix B - Order of the United States Court of Appeals for the Second Circuit, Filed April 9, 1998

United States Court of Appeals
FOR THE SECOND CIRCUIT

SERGIO LAFONTAINE,

Petitioner, 97-2546
Docket Number

-against- **NOTICE OF MOTION**

COMMISSIONER OF CORRECTIONAL SERVICES,

Use short title Respondent.

****

Brief statement of the relief requested:

Petitioner desires extension of time to file petition for rehearing. Assigned counsel seeks to be relieved if substantive claim is frivolous.

By: (Signature of attorney) **Appearing for: (Name of party)**

Signed name must be printed beneath **Date**

Perry S. Reich 4-6-98

IT IS HEREBY ORDERED that the motion be and is granted leave granted to file pro se petition for rehearing on or before May 11, 1998.

For the Court
George Lange III, Clerk

By:_____
Arthur M. Heller
Administrative Attorney

Filed: April 9, 1998

Appendix C - Order of the United States Court of Appeals for the Second Circuit, Filed April 14, 1998

United States Court of Appeals
FOR THE SECOND CIRCUIT

SERGIO LAFONTAINE,

Petitioner, 97-2546
Docket Number

-against- **NOTICE OF MOTION**

COMMISSIONER OF CORRECTIONAL SERVICES,

Use short title Respondent.

****

Brief statement of the relief requested:

Petitioner desires extension of time to file petition for rehearing. Assigned counsel seeks to be relieved if substantive claim is frivolous.

By: (Signature of attorney) **Appearing for: (Name of party)**

Sergio LaFontaine

Signed name must be printed beneath **Date**

Perry S. Reich 4-6-98

IT IS HEREBY ORDERED that the motion that counsel be relieved be GRANTED. The motion for an extension of time is hereby DENIED. IT IS FURTHER ORDERED that this Court's order dated April 9, 1998, be , and it hereby is VACATED.

For the Court
George Lange III, Clerk

Filed: April 14, 1998

By:_____
Beth J. Meador,
Administrative Attorney

Appendix D - Report and Recommendation of the Honorable Naomi Reice Buchwald, United States District Court (SDNY), Dated May 19, 1997

II. The Prosecutor's Use of Peremptory Challenges

Petitioner claims that "[f]ollowing the first round of questioning in the jury selection process, the prosecutor exercised six peremptory challenges to eliminate every prospective juror with a Hispanic surname in the jury box[, and l]ater, the prosecutor peremptorily challenged yet another prospective Hispanic juror." (Pet'r's Mem. of Law at 6.) Petitioner argues that based on the trial record, "the *Batson* violation is patent."

The threshold issue in any habeas analysis is the review standard to be employed. To identify the appropriate standard, a determination must be made as to whether the state court's ruling is to be considered one of fact, one of law, or a mixed question of law and fact. *Thomas v. Scully,* 854 F. Supp. 944, 953 (E.D.N.Y. 1994) (finding that deference is only given to findings of fact, not issues of law or mixed issues of law and fact) (*citing Marshall v. Lonberger,* 459 U.S. 422 (1983)). A state court's findings in the *Batson* context are considered factual and are presumed to be correct unless petitioner rebuts the presumption of correctness by "clear and convincing evidence." 28 U.S.C. § 2254(e), as amended. *See Purkett v. Elem,* 514 U.S. 765, 115 S. Ct. 1769, 1771-72 (1995); *Hernandez v. New York,* 500 U.S. 352, 365 (1991) ("Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson,* the finding 'largely will turn on an evaluation of credibility'")

(*quoting Batson,* 476 U.S. at 98 n.21); *Marshall v. Lonberger,* 459 U.S. at 433-34 (finding that deference should be given to implied as well as express findings of fact); *Brown v. Kelly*, 973 F.2d 116, 120 (2d Cir. 1992), *cert. denied,* 506 U.S. 1084 (1993).

A *Batson* claim proceeds under the following analysis. First, petitioner must make out a prima facie case of purposeful discrimination by showing that the prosecutor has exercised peremptory challenges on the basis of race. The burden then shifts to the State to provide a race-neutral explanation for striking the jurors in question. If the prosecutor advances a facially valid explanation, it will be deemed race-neutral unless discriminatory intent is inherent in the explanation. *Bryant v. Speckard,* 929 F. Supp. 640, 646 (W.D.N.Y. 1996); *see also Purkett,* 115 S. Ct. at 1771 (finding that the prosecutor's explanation need not be "persuasive, or even plausible" because "[a]t this second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation"). Finally, the trial court must determine whether the defendant has proven purposeful race discrimination. *See Purkett,* 115 S.Ct. at 1770; *Hernandez,* 500 U.S. at 3S8; *Batson,* 476 U.S. at 92-93; *Brown,* 973 F.2d at 120. The Second Circuit has held that

> [i]n deciding the ultimate issue of discriminatory intent, the judicial officer is entitled to assess each explanation in light of all the other evidence relevant to prosecutorial intent. The officer may think a dubious explanation undermines the bona fides of other explanations or may think that

> the sound explanations dispel the doubt raised by a questionable one. As with most inquiries into state of mind, the ultimate determination depends on an aggregate assessment of all the circumstances.

United States v. Alvarado, 951 F.2d 22, 26 (2d Cir. 1991) ("Alvarado III"). "Given the often subtle reasons for the exercise of peremptory challenges, a court's determination of whether a prosecutor has used them in a discriminatory fashion will often turn on the judge's observations of prospective jurors and the attorneys during *voir dire* and an assessment of their credibility." *McCrory v. Henderson,* 82 F.3d 1243, 1248 (2d Cir. 1996).

With this background in mind, we turn to the specific facts of this case. As we noted earlier, the trial judge made an overall assessment of the peremptory challenges made by the prosecutor, and found that there was no *Batson* violation which would require reseating of those challenged prospective jurors. We conclude that a general assessment of the *voir dire* process is sufficient in the context of habeas review of a *Batson* challenge. In reaching this conclusion, we rely on the clear authority that a trial judge may assess credibility and evaluate each explanation in the context of all the explanations. Moreover, given all the reasons set forth in the Second Circuit's decision in *McCrory* that require a *Batson* challenge to be contemporaneous, we find that defense counsel's failure to pursue the challenges during the *voir dire* is a waiver of the *Batson* claim. Nevertheless, we will examine each challenged juror in the interest of

Appendix D
[Report and Recommendation of the Hon. Naomi Reice Buchwald of the USDC (SDNY)]

completeness.[1]

With regard to Ms. Rodriguez and Mr. Vargas, it will be recalled that the prosecutor explained that she challenged Ms. Rodriguez because Ms. Rodriguez equivocated on whether she could be fair and impartial, and Mr. Vargas because he was soft-spoken. The prosecutor's explanations reflect her subjective analysis of the two jurors and, as the Second Circuit noted in *McCrory,* "often the reasons behind that decision cannot be easily articulated." *McCrory,* 82 F.3d at 1247 (*quoting Thomas v. Moore,* 866 F.2d 803, 805 (5th Cir.), *cert. denied,* 493 U.S. 840 (1989)). "An impression of the conduct and demeanor of a prospective juror during the *voir dire* may provide a legitimate basis for the exercise of a peremptory challenge." *Brown v. Kelly,* 973 F.2d at 121. Because there are often subtle reasons for exercising a peremptory challenge, the trial judge must observe and assess both the prospective jurors and the attorneys during the *voir dire*. *McCrory,* 82 F.3d at 1248. In this case, the judge accepted the prosecutor's subjective challenges of these two jurors and even noted that there was an alternative and objective basis for either side to challenge Mr. Vargas, i.e., his lawsuit against the New York City Police Department.[2]

---

[1] While defense counsel objected at trial that the prosecutor's explanation with regard to Ms. Rodriguez was pretextual, defense counsel did not make a similar objection with regard to any other challenged juror.

[2] *Cf. Howard v. Senkowski,* 986 F.2d 24, 27 (2d Cir. 1993) (finding that a peremptory challenge based on

Appendix D
[Report and Recommendation of the Hon. Naomi Reice Buchwald of the USDC (SDNY)]

With respect to Ms. Valez and Mr. Vasquez, the trial judge clearly agreed with the prosecutor that Ms. Valez and Mr. Vasquez had difficulty understanding the proceedings. Furthermore, petitioner has never contended that the trial judge's findings with respect to these two prospective jurors were not fairly supported by the evidence.[3]

With regard to Mr. Felix, accepting both sides' assertion notwithstanding the trial record, while the trial judge was surprised that the prosecutor did not know "Felix" was an Hispanic surname, he did not reject the argument on credibility grounds.

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race may be acceptable where there is a race-neutral motivation as well).

[3] Petitioner made no argument with respect to these two jurors on his direct appeal. Therefore, his argument with respect to these two jurors is unexhausted. *Picard v. Connor,* 404 U.S. 270, 275 (1971). Nonetheless, we will reach the merits of his claim, pursuant to 28 U.S.C. § 2254(b)(2), as amended, which states that "An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." *See Clancy v. Commissioner of Correctional Services. State of New York,* 956 F. Supp. 490 (S.D.N.Y. 1997) (applying section 22S4(b)(2), as amended, retroactively to habeas petition filed after effective date of the AEDPA to reach the merits of an unexhausted claim in a "mixed" petition).

Appendix D
[Report and Recommendation of the Hon. Naomi Reice Buchwald of the USDC (SDNY)]

With regard to Mr. Garcia, defense counsel never pursued his objection to Garcia's challenge during jury selection. Defense counsel was required to make a contemporaneous objection to the challenge of Mr. Garcia in a meaningful way so that the trial judge was afforded an opportunity to remedy any possible *Batson* violation during the jury selection. *McCrory,* 82 F.3d at 1247.

Finally, with respect to Ms. Hector, there is simply no evidence that she was peremptorily challenged because the four jurors peremptorily challenged after the unsuccessful challenge for cause were identified only by number. Furthermore, defense counsel waived any objection by failing to make the necessary objection to the peremptory challenges that is required in order to give the trial judge the opportunity to take any curative measures.

In sum, the presiding trial judge was satisfied as a whole that there was no *Batson* violation in connection with the prosecutor's peremptory challenges. Petitioner has not overcome the presumption of correctness with respect to the trial judge's finding of fact. Therefore, we deny the habeas corpus petition on this ground.

Appendix E Memorandum and Order of the Honorable Lawrence McKenna, USDJ (SDNY), Dated June 2, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SERGIO LAFONTAINE, 96 Civ. 9308 (LMM)

Petitioner,

MEMORANDUM AND ORDER

-against-

COMMISSIONER OF CORRECTIONAL SERVICES,

Respondent.

----------x

McKENNA, D.J.

By Report and Recommendation dated May 19, 1997 (the "Report"), Magistrate Judge Buchwald has recommended that the above petition for a writ of habeas corpus be denied.

Petitioner has filed timely objections to the Report.

After de novo determination of the portions of the Report objected to, 28 U.S.C. § 636(b)(1)(C), the Court accepts the Report.

The writ is denied, and petition is dismissed.

SO ORDERED.

Dated: New York, New York
June 2, 1997

LAWRENCE M. MCK
U.S.D.J.

Appendix F - Memorandum and Order, Certificate of Appealability, Dated August 7, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

SERGIO LAFONTAINE, 96 Civ. 9308 (LMM)

Petitioner,

MEMORANDUM AND ORDER

-against-

COMMISSIONER OF CORRECTIONAL SERVICES,

Respondent.

----------x

McKENNA, D.J.

Petitioner's motion for a certificate of appealability pursuant to Fed. R. App. P. 22 and 28 U.S.C. § 2253, from the Court's Memorandum and Order dated June 2, 1997 (accepting the Report and Recommendation of Magistrate Judge Buchwald dated May 19, 1997, denying the writ and dismissing the petition) is granted only as to the issue whether the prosecutor's use of peremptory challenges violated *Batson v. Kentucky*, 476 U.S. 79 (1986). Such an appeal would be taken in good faith within the meaning of 28 U.S.C. § 1915.

The motion for a certificate of appealability is otherwise denied because, as to the other issues, petitioner has not made a substantial showing of the denial of a constitutional right or that an appeal would be taken in good faith.

SO ORDERED.

Dated: New York, New York
August 7, 1997

LAWRENCE M. MCKENNA
U.S.D.J.

Appendix G - Decision, *People v. Lafontaine*, New York State Appellate Division, First Department, Dated February 23, 1993 [Pages 15a - 17a]

SUPREME COURT OF NEW YORK
APPELLATE DIVISION - FIRST DEPARTMENT

Sullivan, J.P., Rosenberger, Wallach, Ross, JJ.

48132 The People of the State of New York,
Respondent,

-against-

Sergio LaFontaine,
Defendant-Appellant.

48133 The People of the State of New York,
Respondent,

-against-

Edwin Galarza,
Defendant-Appellant.

(48132): Judgment, Supreme Court, New York County (Edward McLaughlin, J.), rendered May 24, 1989, after a jury trial, convicting defendant LaFontaine of conspiracy in the second degree, criminal sale of a controlled substance in the first degree, criminal possession of a controlled substance in the third degree, and criminally using drug paraphernalia in the second degree, and sentencing him to a term of 10 to 20 years for the conspiracy conviction, to run consecutively to concurrent terms of 25 years to life, 25 years to life, 12 1/2 to 25 years (6 times), and 6 months, respectively, and to a fine of

Appendix G
[Decision, *People v. Lafontaine*, NYSAD, 1st Dept.]

$5,000 for the conspiracy, first-degree sale and first-degree possession convictions, respectively, unanimously affirmed.

(48133): Judgment, Supreme Court, New York County (Edward McLaughlin, J.), rendered May 24, 1989, after a jury trial, convicting defendant Galarza of conspiracy in the second degree, two counts of criminal sale of a controlled substance in the first degree, four counts of criminal sale of a controlled substance in the third degree, criminal sale of marijuana in the fourth degree, and criminally using drug paraphernalia in the second degree, and sentencing him to concurrent terms of 8-1/3 to 25 years, 20 years to life (2 times), 8-1/3 to 25 years (2 times), 8-1/3 to 25 years (4 times), 6 months, and 6 months, respectively, unanimously affirmed.

To the extent that either defendant has preserved a record of the jury selection voir dire, we agree with the trial court that the prosecutor provided racially neutral reasons for the exercise of peremptory challenges (*People v Hernandez*, 75 NY2d 350, 356) as to each strike at issue.

Nor did the court err in discharging a sworn juror pursuant to CPL 270.35 on the ground that the juror, who had already failed to comply with the court's admonishment to appear on time for the proceedings, committed perjury in his explanation for an unexcused absence (*compare*, *People v Landskroner*, 91 AD2d 755, *with People v Gallina*, 137 AD2d 617, *lv denied*, 71 NY2d 1027; *see also, People v Fox*, 172 AD2d 218, 219-220, *lv denied*, 78 NY2d 966). Defendant LaFontaine's contention that the seizures of physical evidence from his mailbox expanded beyond the search warrant is without merit, since the mailbox was appurtenant to the

Appendix G

[Decision, *People v. Lafontaine*, NYSAD, 1st Dept.]

specified premises (*see, United States v Ross*, 456 US 798, 820-821; *People v Nieves*, 36 NY2d 396, 401).

We have considered defendants' remaining contentions and, to the extent preserved, find them to be without merit.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: February 23, 1993

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Clerk

Appendix H - Certificate of the New York State Court of Appeals Denying Leave to Appeal, Dated May 24, 1993

State of New York
Court of Appeals

BEFORE: HON. JUDITH S. KAYE, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK;

Respondent,

-against-

CERTIFICATE DENYING LEAVE

SERGIO LaFONTAINE,

Appellant. 5100/88

I, JUDITH S. KAYE, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at: New York , New York
May 24, 1993

_____
Chief Judge

*Order of the Appellate Division, First Department, entered February 23, 1993, affirming a judgment of Supreme Court, New York County, rendered May 24, 1989.

*Description of Order.

Appendix I - Certificate of the New York State Court of Appeals Denying Leave Upon Reconsideration, Dated August 20, 1993

State of New York Court of Appeals

BEFORE: HON. JUDITH S. KAYE, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

RECONSIDERATION CERTIFICATE DENYING LEAVE

SERGIO LaFONTAINE,

Appellant. 5100/88

I, JUDITH S. KAYE, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at: New York , New York
August 20, 1993

Chief Judge

*Order of the Appellate Division, First Department, entered February 23, 1993, affirming a judgment of Supreme Court, New York County, rendered May 24, 1989.

*Description of Order.

Appendix J - Excerpts, Jury Selection Proceeding [Pages 20a - 28a]

COLLOQUY

THE COURT: As to the first twelve people in the box, do the People have any cause challenges

MS. MANUELIAN: Yes, your Honor, Juror #7. I think he expressed a fear problem with the concept of reasonable doubt and could not decide --

MR. MARI: We will join in that application.

THE COURT: Granted by consent. He is out. Anybody else by the People?

MS. MANUELIAN: No.

THE COURT: Cause by the defendants?

MR. MARI: None.

THE COURT: Preemptory by the People?

MS. MANUELIAN: One, three, four, seven, eight, nine --

Appendix J
[Excerpts, Jury Selection Proceeding]

MR. OLIVERO: I am getting the distinct feeling that the People are eliminating --

MR. EVSEROFF: Let her finish.

THE COURT: Mr. Smith, #11?

MR. EVSEROFF: Yes.

MS. MANUELIAN: Mr. Vargas #12.

MR. MARI: All hispanics.

MS. MANUELIAN: one, two, three, four, five, six eight. nine, twelve.

MR EVSEROFF: Your Honor, we challenge peremptorily two, Six, ten and eleven. We are exercising jointly for challenges.

THE COURT: The next six by the People?

MS. MANUELIAN: None for cause.

THE COURT: Cause by the defendants?

MARI: No, sir.

Appendix J
[Excerpts, Jury Selection Proceeding]

THE COURT: Peremptorily by the People?

MS. MANUELIAN: thirteen, fourteen, fifteen, sixteen, eighteen.

THE COURT CLERK: People used eleven.

MR. EVSEROFF: We have preemptory challenges.

MR. OLIVERO: For the record. Judge, 1 know that the District Attorney has been systematically taking off blacks and hispanics, especially hispanics. She intimated earlier that hispanics might know what was on the tape, should the tapes have to be played and, at this point, she intimated that the defense would want hispanics, and after seeing her preemptory challenges, it seems clear to me that she is knocking off as many minority members, specifically Spanish and blacks.

MR. EVSEROFF: May we have a moment?

(Counsel conferring.)

MR. OLIVERO: For the record, Adelpho Felix was knocked off, Aurea Valez was knocked off Edwardo Vasquez was knocked off, David Vargas was knocked

off, Catherine Rodriguez was knocked off.

Your Honor, if the defendants are to be tried by a representation of their peers within society, I would ask the Court to acknowledge that hispanics are also part of that group.

MR. MARI: I am joining in that. I believe there is no other word for it but race.

MR. OLIVERO: Every hispanic was knocked off preemptorily. If anything, I could consider that racism.

THE COURT: Six hispanics. Is there anything the People wish to say?

MS. MANUELIAN: Yes, your Honor. First of all, my understanding of Mr. Felix -- I did not assume that he was hispanic. The only person that I think is obviously hispanic in just talking to her, as to whether they speak Spanish was Ms. Valez

My reason for knocking her off -- I thought I she had a problem understanding. I think it was communicated when she was up here at the bench yesterday during the initial discussions. Mr. Vasquez also clearly, in my impression, had a problem understanding. He seemed somewhat confused yesterday when he came up to the

bench and he was somewhat confused today when you asked him point blank questions about certain things, he would say no, then he would go ahead and answer in the affirmative. Again, that was my reason for striking him from the panel.

Mr. Vargas seemed very soft spoken and I, on a personal, did not feel comfortable with that juror. Again, my basis was not because he was hispanic.

Who is left? Ms. Rodriguez was that she equivocated on the issue whether she could be fair and impartial. She thought she could be fair My impression of that was that she really had no position one way or the other. She would try to be fair but she wasn't sure and that was the basis for striking her from the panel.

MR. OLIVERO: If anything, when Ms. Rodriguez answered, your Honor commended her answer to all the potential jurors.

Further, if she felt that the lady couldn't be fair, it should have been a challenge for cause, and then your Honor could have decided whether it was a cause challenge. I think what is happening here is the Assistant trying to cover up that she is taking off hispanics racially.

MR. MARI: I would like to point out one other factor, naturally, you cannot tell from just looking at the prospective jurors in the audience, but you can get some

indication of that by looking out into the audience, I would say. your Honor, when those particular jurors were placed in the juror box, I said to myself, looking at them and looking at the remaining prospective jurors in the audience, that most of the hispanics in the audience were placed in the jury box. Of course there are several out, but Ms Manuelian must be aware of the fact by using these preemptory challenges now she can, Vargas could have been excused by either side, but Vargas is suing the Police Department because he was falsely arrested apparently by two New York city Police Officers.

I am mystified that somebody who is in this line of work, doesn't know Felix isn't a hispanic name. Since I am satisfied at least three of them have certain articuable reasons, I am not going to stop the trial. I am not going to force one or all of those people who were challenged to be seated over the Prosecution's objections.

We will all pay attention. We will see what happens next. Is there anybody amongst that group who is a potential alternate for later rounds? Would you all talk about that?

(Counsel confers.)

MR. EVSEROFF: I am not sure. Your Honor, I am not sure that if we were to say we might be waiving our

objection. I don't know.

THE COURT: The next round is --

MR. MARI: I don't think. we are going to have -- you say this matter is going to be watched by the Court closely in the future. No question that your Honor will do that. The problem is most of our hispanics from the larger group were in the box at this time, and there aren't many more out there.

(Two jurors selected.)

THE COURT: The remaining two persons satisfactory to each side?

MR. MARI: Yes.

MR. OLIVERO: Yes.

MR. EVSEROFF: Yes.

MS. MANUELIAN: Yes.

THE COURT: You folks can go with the Officer. Please give him whatever biographical information he asks you for and we will continue with this. Come back

outside of this room at 3:30. Bring a book.

(Whereupon the selection of the jury continued.)

(The following occurred at the bench in the absence of the jury.)

THE COURT: With regard to the first twelve, any cause challenges by the People?

MS. MANUELIAN: Yes. I will challenge Ms. Hector. I cannot see judging from her experience with the types of translations, how she will be able to put aside her expertise and listen fairly or listen partially to the translations given to her in the particular case.

THE COURT: You have some incoherent translations because that is the only reason you being so upset?

MS. MANUELIAN: It will be a large issue in this case especially whether we will be playing the Spanish tapes.

MR. EVSEROFF: I object to the challenge.

MR. MARI: Ms. Mauelian's proof should be put to the test

Appendix J
[Excerpts, Jury Selection Proceeding]

THE COURT: I don't see a challenge for cause. She said she has expertise. She says she can follow the law. The situation is somewhat confusing. I am not certain what is going to happen. I don't know the circumstances, if any, under which this case will be played. She says she could follow what the Court's instructions are, so the application is denied. Any cause by the defense?

MR. EVSEROFF: No.